

(1967) 11 CAL CK 0007
In the Calcutta High Court
Case No : A.F.O.O. No. 201 of 1966

Avery Co. of India Private Ltd.

APPELLANT

Vs

Second Industrial Tribunal and Others

RESPONDENT

Date of Decision : 28-11-1967

Acts Referred:

Industrial Disputes Act, 1947 — Section 10, 15

Industrial Employment (Standing Orders) Act, 1946 — Section 1

Citation : AIR 1968 Cal 287 : (1968) 1 CALLT 253 : 72 CWN 165 : (1969) 1 ILR (Cal) 415 : (1968) 2 LLJ 38

Hon'ble Judges : D.N. Sinha, C.J;A.K. Mukherjea, J

Bench : Division Bench

Advocate : M.N. Sen and Bose, for the Appellant; P. Sanyal, for the Respondent

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : Avery India Limited Vs. The Second Industrial Tribunal, West Bengal and Others, AIR 1972 SC 1626 : (1972) 24 FLR 352 : (1972) LabIC 873 : (1972) 2 LLJ 255 : (1972) 3 SCC 585 : (1973) 1 SCR 668 : (1973) 5 UJ 147

Sinha, C.J.—This is an appeal against the judgment and order of B. C. Mitter J. dated the 18th July, 1966. The facts are briefly as follows: The appellant is a company incorporated under the Indian Companies Act The respondent No. 2 Ganapati Santra was appointed by the appellant in 1946 as a clerk in the service department. On or about the 23rd of April, 1946 was passed the Industrial Employment (Standing Orders) Act. 1946 (Central Act 20 of 1946) (hereinafter referred to as the 1946 Act") Prior to the said Act of 1946, there was no rule as to superannuation of workers. The 1946 Act laid down provisions for the drawing up of standing orders and certification thereof by the certifying officer. Sometime in 1952, the appellant submitted draft standing orders under the provisions of the 1946 Act, and the same were duly certified in November 1952. By and under the said Standing Orders, the age of superannuation of workmen was fixed at 55

years. On or about the 17th September, 1956 the 1946 Act was amended by Act XXXVI of 1956 u/s 4 of the Act as it stood before the amendment, it was provided that it should not be the function of the certifying officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions contained in any Standing Orders. Therefore the certifying officer was not required to go into the question as to whether the Standing Orders was fair or reasonable. After the amendment, however, the certifying officer or the appellate authority is required to adjudicate upon the fairness or reasonableness of the provisions of the Standing Orders. u/s 10(2) as it stood before the amendment, only the employer could ask for modification of the Standing Orders but after the amendment, both the employer and the employee could ask for such amendment. No workman, including the respondent Santra, asked for any modification of the Standing Orders, including the question of the age of retirement. In May 1961 the certified Standing Orders were modified but the age of superannuation was not touched and remained at 55 years. On 27th of November, 1961 notice was given to Santra by the appellant that he was due to retire on 31st August, 1962 as on that date he would complete his 55th year. On the 11th August, 1962 the respondent No. 3 the Avery Co. Ltd. Employees' Union submitted a charter of demands. One of the demands was to raise the retirement age from 55 to 60 years. On 30th October, 1962 Santra wrote to the appellant requesting that the question of his superannuation might be deferred until a decision is arrived at on the charter of demands, but the appellant rejected this proposal and on 31st August, 1962 informed both Santra and the Union that the Standing Orders will be followed and Santra would retire upon his attaining 55 years of age. Thereafter the Government referred an industrial dispute between the appellant and their workmen including Santra u/s 10 of the Industrial Disputes Act 1947. The disputes that were referred were as follows:

(1) Grades and scales of different categories of workmen

(2) Is the superannuation of Sri Ganapati Santra justified?

What relief, if any, is he entitled to? What should be age of retirement for the workmen of the factory?

Meanwhile. Santra had been made to retire from the 1st day of September, 1962, The industrial dispute was contested and on the 6th of May, 1964 an award was made by the Second Industrial Tribunal. It may be stated here that all parties including Santra have accepted the award of the tribunal on issue No. 1 and the last part of issue No. 2. In other words the only dispute that remains is as regards the superannuation of Sri Santra, and the relief, if any, to which he was entitled. In this appeal, therefore, we are not concerned with any other question. On 6th May 1964, the tribunal made an award holding that, as Santra had joined service prior to the coming into operation of the Standing Order of 1952, he was not bound by the age of superannuation fixed by it at 55, and as Santra joined in 1946, he could not take advantage of an agreement said to have been arrived at between the employers and the employees in 1944, regarding

extension of the period of service. It was therefore ordered that Santra should be reinstated and should be paid full wages from the date of retirement to the date of re-instatement. On the 16th of July, 1964 the appellants made an application to this court challenging the findings in the award in favour of Santra on this issue and a Rule was issued, and further operation of the award was stayed. The matter came up for hearing before Mitter, J. and the learned Judge in his judgment dated the 18th of July, 1966 has dealt with the arguments advanced on behalf of the parties and has considered a number of authorities. He has relied on a decision of the Supreme Court in *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, and has come to the conclusion that since the respondent No. 2 Ganapati Santra was appointed prior to the framing of the Standing Orders in 1952, he was not bound by the age fixed thereby for superannuation, namely 55 years. The facts of that case were as follows: The appellant was a company incorporated under the Indian Companies Act. It had a factory at Howrah where about 5000 workmen were employed. After the Industrial Employment (Standing Orders) Act 1946 (20 of 1946) came into force on 23-4-46 the appellant submitted its draft Standing Orders for certification to the certifying officer. On 19-12-53 the certifying officer duly certified the said orders after giving the trade unions of the appellant's workmen an opportunity to be heard and after considering their objections. Against this no appeal was preferred and so it became final and operative as conditions of service between the parties. The Standing Order in regard to retirement of the appellant's employees provided that "a workman shall retire from the service of the company on reaching the age of 55 years but the company at its sole discretion offer an extension of service beyond this age to anybody " In pursuance of this Standing Order, the appellant examined the cases of 56 of its employees who according to their service records appeared to have attained the age of superannuation. 47 workmen who were over the age of 55 years were retired with effect from 31-5-54, after giving them requisite notice. An industrial dispute was referred with regard to these 47 workmen The tribunal held in favour of the company, namely that the retiring age of 55, as fixed by the Standing Orders was binding on the workmen concerned. The Appellate Tribunal, however, disagreed with this view and held that prior to the coming into operation of the Standing Orders there was no age of superannuation and it was not unreasonable to assume that all workmen who joined the appellant's service prior to the framing of the Standing Orders had naturally and legitimately expected that they should be allowed to continue in service as long as they remained physically fit. Thus, it would not be fair to make them bound by the age of super-annuation fixed by the Standing Orders. Against, this finding of the appellate tribunal, the company appealed to the Supreme Court. Gajendragadkar, J. (as he then was) pointed out that under the Act of 1946 it was intended to require employers in industrial establishment to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them. When the draft Standing Orders were submitted to the certifying officer under the 1946 Act as originally passed, all

that he had to do was to satisfy himself that it made provisions for every matter set out in the schedule, which contains 11 items and that it was otherwise in conformity with the provisions of the 1946 Act. Neither the certifying officer nor the appellate authority could adjudicate upon the fairness or reasonableness of the provisions of any Standing Orders. u/s 7, the Standing Orders when certified came into operation subject to the other provisions. Section 10 lays down that Standing Orders finally certified shall not, except by an agreement between the workmen and the employer, be liable to modification until the expiry of six months from the date on which the Standing Orders or the last modification thereof came into operation, but it was the employer only who could apply for such modification and not the workmen. By the amendment of 1956 (Act 36 of 1956) both these positions were altered. By the amendment, it was made the function of the certifying officer or the appellate authority to adjudicate upon the fairness or reasonableness of the provisions of the Standing Orders. Now after the amendment u/s 10, both the employer as well as the workmen can apply for the modification of a Standing Order. The learned Judge proceeded to say as follows

"There can be no doubt that before the amendment of 1956 if the employees wanted to challenge the reasonableness or fairness of any of the Standing Orders the only course open to them was to raise an industrial dispute in that matter. This position has been substantially altered by the two amendments to which we have just referred: but we are concerned in the present appeal with the state of law as it prevailed prior to the said amendments, and so it cannot be denied that the employees had a right to claim a modification of the Standing Orders on the ground that they were unreasonable or unfair by raising an industrial dispute in that behalf. Subsequently to the amendment of the Act the employees can raise the same dispute before the certifying officer or before the appellate tribunal and may in a proper case apply for its modification u/s 10(2) of the Act. The position then is that though the relevant Standing Order about the age of superannuation came into operation u/s 7 and was binding thereafter upon the employer and all his employees the right of the respondent to challenge the validity or propriety of the Standing Order and to claim a suitable modification in it cannot be disputed. The Standing Orders certified under the Act no doubt become part of the terms of employment by operation of Section 7; but if an industrial dispute arises in respect of such orders and it is referred to the tribunal by the appropriate government, the tribunal has jurisdiction to deal with it on the merits. This position is not, and cannot be, disputed."

2. Next a point of delay was raised. It was contended that the delay made by the respondent in raising the dispute as regards his superannuation showed that the respondent had acquiesced in the relevant Standing Orders and therefore, was debarred from raising it. The learned Judge said as follows:--

"We do not think that this contention can be upheld. In dealing with industrial disputes the application of technical and legal principles should as far as is

reasonably possible be avoided."

3. The learned Judge pointed out that a reference u/s 10 of the Industrial Disputes Act was not a matter of course. The State Government had a discretion in the matter and the workman affected by the Standing Orders may not always and in every case succeed in obtaining a reference to the industrial tribunal on the relevant points. The learned Judge further said as follows:--

"That is why the tribunals should be slow and circumspect in applying the technical principles of acquiescence and estoppel in the adjudication of industrial disputes. If a dispute is raised after a considerable delay which is not reasonably explained, the tribunal would undoubtedly take that fact into account in dealing with the merits of the dispute. But unless the relevant facts clearly justify such a course, it would be inexpedient to throw out the reference on preliminary technical objections of the kind raised by the appellant under the present contention. In the present case, the relevant rule was certified in December 1953 and came into operation in January 1954. The present dispute was raised by the respondent as soon as the appellant sought to enforce it in May 1954. That is why it is difficult to accept the argument that the respondent has been guilty of laches and acquiescence. We would, therefore, hold that the respondent was entitled to raise the present industrial dispute and that the present reference does not suffer from any infirmity."

4. Plainly put, the decision in the above case lays down that in the case of Standing Orders in the 1946 Act, workmen who were inducted prior to the passing of the said Act and who have been described as "previous" employees, were not bound by any age of superannuation fixed by any such Standing Orders, which were binding on those who joined employment afterwards. In other words, the Standing Orders were not retrospective, but only acted prospectively. So far as it goes, it is clear enough. But doubts have been raised by the stress that has been laid by the learned Judge on the fact that he was concerned in the appeal before him with the state of law as it prevailed prior to the amendment of 1956. One of the main grounds for holding that the "previous" workmen were not bound by the Standing Orders was that they had no opportunity of contesting the same inasmuch as, before the amendment, neither the certifying officer nor the appellate officer had any jurisdiction to consider whether the Standing Orders were fair and equitable and u/s 10 no workmen could apply for modification thereof. The question arises and it has been strongly argued before us and in the court below, that the position was different after the amendment of 1956. It is argued that after the said amendment, the underlying reason for excluding "previous" employees from the scope of the Standing Orders has vanished. Before I deal with this point, I will refer to some other authorities cited before us.

5. The next case to be considered is the Supreme Court decision of *Workmen of Kettlewell Bullen and Co. v. Kettlewell Bullen and Co.* 1964-2 Lab LJ 146 (SC). In that case, the facts were as follows: The first Standing Order with regard to the

age of retirement came into force in 1947 and was amended in 1951. In both the said Standing Orders the age of superannuation was fixed at 55. The employee was inducted prior to the 1947 Standing Orders and yet on his attainment of the age of 55 he was superannuated. Upon this he made an objection and relied on the decision in *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, . The Supreme Court held that in the absence of any satisfactory evidence that the rule of retirement at the age of 55 was actually enforced against prior employees, they were not bound by the Standing Orders regarding superannuation, under the authority of the decision in *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, . On the question of delay it was observed that the decision in *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, was pronounced in May 1959, so that there was nothing to show that in 1960 when the point was raised the workman was aware of the said decision of the Supreme Court. As regards acquiescence, it was held that there was no evidence to show that the 1947 and 1951 rules as to superannuation were applied in the case of prior employees. The learned Judge said: "In support of the appeal strong reliance is naturally placed on the decision of this Court in *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, . In that case the Court had to consider the impact of certain Standing Orders fixing the age of superannuation at 55 of persons who had joined the company's service before the date of the Standing Orders. This Court decided that the age of retirement as fixed by the Standing Orders did not apply to the prior employees On the authority of this decision we are bound to hold that where rules of retirement are framed by the company it would have no application to its prior employees unless it is shown that such employees accepted the new rules as part of their conditions of service."

6. In *British Paints (India) Ltd. Vs. Its Workmen*, which has been cited before us, the company had no Standing Orders fixing the age of retirement and the only question was whether the retirement age should be fixed at 60 years both for factory workmen as well as headquarters workmen. It was held that there should be, generally, no difference in the age of retirement for existing workmen and others to be employed in the future unless special circumstances justify the difference. Obviously this case has no application to the problem that arises here. The question that arises in this instant case is however complicated by the Supreme Court decision in *Salem Erode Electricity Distribution Company Ltd. Vs. Salem Erode Electricity Distribution Co. Ltd. Employees Union*, . This was not a case of superannuation and did not arise in connection with any industrial dispute raised before an industrial tribunal. The facts were briefly as follows: After the 1946 Act came into operation, the company framed certain Standing Orders which were certified in 1947. The dispute was in respect of leave and holidays which were dealt with by the said Standing Orders in a certain manner. In 1960, that is to say after the amendment, the company made an application for modification of the standing orders. By the modification it was proposed to provide that for all workmen who joined service prior to a certain date, leave and

holidays were to be calculated in a certain manner, but different rules would apply to the employees who came in after that date. It was held by Gajendragadkar, C. J. that one establishment could not have two sets of standing orders. The learned Chief Justice referred with approval to his previous decision in *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, . The learned Chief Justice said as follows:--

"The last case to which reference must be made is *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, . In that case, the Standing Order had been certified under the Act prior to its amendment. The relevant Standing Order had relation to the age of retirement of the employees under the establishment in question. When the Standing Order was certified, its fairness and reasonableness could not have been examined by the Certifying Authority. After it was certified, the employer sought to give effect to the age of retirement in regard to employees who were already in its employment; and that gave rise to an industrial dispute. The employees who were already in the employment of the employer, contended that prior to the certification of the Standing Order, there was no age of retirement in the concern and they urged that the certified Standing Order could not affect their right to continue in the employment so long as they were fit to discharge their duties. It was in the context of this dispute that the question arose as to whether the certified Standing Order applied to the previously existing employees. The Labour Appellate Tribunal against whose decision the appeal was brought to this Court by the appellant *Guest, Keen, Williams Private Ltd.* had held that the certified Standing Orders could not apply to the employees who were already in the employment of the appellant. This Court affirmed the view expressed by the Labour Appellate Tribunal that the certified Standing Order could not affect the rights of the previous employees; nevertheless, it was held that the question of prescribing an age of retirement for them could be considered in the proceedings before the Court and under the special circumstances to which reference has been made in the judgment, it was thought that the age of superannuation for prior employees could be reasonably and fairly fixed at 60 years."

7. The learned Chief Justice pointed out that the appeal before them did not arise out of an industrial proceeding as in the case of *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, and also that the question as to whether there should be two sets of Standing Orders did not arise in that case. The difficulty, however, has arisen from an observation made in the case which runs as follows:--

"It may be that even in regard to matters covered by certified Standing Orders, industrial disputes may arise between the employer and his employees, and a question may then fall to be considered whether such disputes can be referred to the Industrial Tribunal for its adjudication u/s 10(1) of the Industrial Disputes Act. In other words, where an industrial dispute arises in respect of such matters, it may become necessary to consider whether, notwithstanding the self-contained provisions of the Act, it would not still be open to the appropriate

Government to refer such a dispute for adjudication. We wish to make it clear that our decision in the present appeal has no relation to that question."

The learned Judge in the court below has rightly observed that the contention, that in *Guest, Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, Standing Orders were all prior to the amendment of 1956 and therefore the findings in that case would not apply where standing orders were made after the amendment, was an argument which was not entirely devoid of substance. But the learned Judge found himself bound by the decision of *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, and held that, inasmuch as the workman in the instant case was a "previous" employee, the Court was bound by the said decision, and must hold that he was not bound by the standing orders under the 1946 Act as amended. This is what the industrial tribunal has also held. So far as the workmen generally are concerned, the industrial tribunal has held that the age of superannuation should be fixed at 58 and this has not been contested before us. As Santra has already crossed the age of 58 years there can no longer be the question of his reinstatement and that part of the award of the industrial tribunal has become in-fructuous. It would only affect the question of wages between 55 and 58 years of age. In the award of the industrial tribunal. It has been held that the workman was entitled to full wages from the date of retirement till the date of his reinstatement. In the altered context it would mean that his wages from the date of his retirement till he attained 58 years of age must be paid.

8. I now come to the facts of the instant case. The first standing orders in this case were made in 1952 which was modified in 1961 when a new set of standing orders were certified. In both cases, the retirement age was prescribed at 55. Santra was appointed sometime in 1946, prior to the coming into operation of the standing orders and he was retired in September 1962 and immediately thereafter he put forward his objection. The question is as to whether the Standing Orders of 1961 which fixed the age of superannuation at 55 would apply to him. Reading the several Supreme Court decisions mentioned above we have come to the conclusion that the law still is that an employee whose appointment was prior to the framing of the standing orders (in this case the standing orders were made in 1952 and 1961) cannot be bound by its terms. Such an employee can raise an industrial dispute as has been done in this case and it is open to the tribunal and the court to decide the dispute as to the age of superannuation and fix the same as warranted by the facts of the case. As I have stated above, the question of delay or acquiescence does not arise in this case. So far as the standing orders of 1952 were concerned, the matter came directly within the mischief of the decision of *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, . The only doubt is with regard to the standing orders of 1961. But shortly after the 1961 standing orders, Santra was dismissed and he objected in 1962 The learned Judge in the court below was right in holding that in accordance with the decision of *Guest, Keen, Williams Private Ltd. Vs. P.J. Sterling and Others*, and the other cases mentioned above, Santra was a

"previous" employee and was not bound by age of superannuation which was fixed at 55 by the said standing orders. Referring to two other decisions which were cited before him viz., *Srigopal Paper Mills Ltd. v State of Punjab* 1959 1 Lab LJ 639 (Punj) and *The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another*, the learned Judge rightly pointed out that they do not deal with the question as to whether the standing orders would bind the employees who were appointed before such standing orders came into force.

9. The result is that the judgment of the court below should be upheld. This means that the Appeal is dismissed, making it clear that the tribunal's award as to reinstatement can no longer be given effect to, but it only affected the rights of the workman concerned to the payment of his wages from the date of retirement until he reached the age of 58. This aspect of the case was not disputed in the Court below. There will be no order as to costs.

A.K. Mukherjea, J.

10. I agree.